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ENVIRONMENTAL ADVOCATES,
THE OCEAN CONSERVANCY,
and WATERKEEPERS NORTHERN
CALIFORNIA

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

NORTHWEST ENVIRONMENTAL ADVOCATES; THE OCEAN CONSERVANCY; and WATERKEEPERS NORTHERN CALIFORNIA and its projects SAN FRANCISCO BAYKEEPER and DELTAKEEPER,)
Plaintiffs,)
v.)
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,)
Defendant.)

Case No. CV 03-05760 SI

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

I. INTRODUCTION

1. This is an action for declaratory judgment and injunctive relief challenging the legality of 40 C.F.R. § 122.3(a), which exempts vessel discharges from the National Pollutant Discharge Elimination System (“NPDES”) permit requirements of the Federal Water Pollution Control Act (hereinafter “Clean Water Act”), 33 U.S.C. § 1251 *et seq.*, and the Environmental Protection Agency’s (“EPA”) failure to rescind such regulation in response to Plaintiffs’ January 13, 1999 petition requesting such rescission.

2. This action arises under and alleges violations of the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 551-706. In particular, Plaintiffs contend that EPA’s actions in promulgating and failing to rescind the permitting exemption contained at 40 C.F.R. § 122.3(a) is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law under 5 U.S.C. § 706(2)(A) and in excess of statutory jurisdiction, authority, or limitations under 5 U.S.C. § 706(2)(C).

3. Plaintiffs seek a declaration from the Court that EPA's actions as described in paragraph 1 hereof are in violation of the Clean Water Act and an injunction directing EPA to repeal and rescind 40 C.F.R. § 122.3(a).

JURISDICTION AND VENUE

4. This Court has jurisdiction over this action by virtue of 28 U.S.C. §§ 1331 (federal question), 2201 (declaratory judgment), 2202 (injunctive relief), as well as 5 U.S.C. § 706 (APA). There is a present and actual controversy between the parties and Plaintiffs have challenged a final agency action pursuant to 5 U.S.C. § 551(13).

5. Venue is properly vested in this court pursuant to 28 U.S.C. § 1391(e) because at least two of the Plaintiffs reside in the district and Defendant maintains offices in San Francisco, California.

INTRADISTRICT ASSIGNMENT

6. This case is appropriate in the San Francisco Division of the Northern District of

1 California pursuant to Local Rules 3-2 and 3-5 because at least two of the Plaintiffs and
2 Defendant maintain offices in San Francisco County.

3 **PARTIES**

4 7. Plaintiff Northwest Environmental Advocates (“NWEA”) is a regional non-profit
5 environmental organization established in 1969 and incorporated under the laws of Oregon in
6 1981. NWEA’s principle place of business is in Portland, Oregon. NWEA’s mission is to work
7 through advocacy and education to protect and restore water and air quality, wetlands, and
8 wildlife habitat in the Pacific Northwest. To this end, NWEA advocates for and promotes
9 informed citizen involvement to support implementation of federal environmental laws both
10 regionally and nationally. NWEA has been active in the development of programs, policies, and
11 regulations for the protection of the nation’s waterways, including those in the Northwest.

12 8. Plaintiff The Ocean Conservancy (“TOC”) is a national non-profit conservation
13 organization with an interest in protecting coastal, estuarine, and marine resources, including the
14 natural ecosystem of the San Francisco Bay and Delta. TOC is headquartered in Washington,
15 D.C. and maintains a regional office in San Francisco, California. TOC has approximately
16 140,000 members, most of whom reside near coastal estuaries around the country. Nearly 5,000
17 members reside in the San Francisco Bay area. TOC’s mission is to protect coastal and marine
18 environments through science-based advocacy, research, and public education.

19 9. Plaintiff Waterkeepers Northern California (“Waterkeepers”) is a regional non-
20 profit public benefit corporation organized under the laws of the State of California.
21 Waterkeepers’ mission is to preserve, protect, and enhance the health of the ecosystems and
22 communities of the San Francisco Bay/Delta region. To further these goals, Waterkeepers
23 actively seeks federal and state agency implementation of environmental laws and, where
24 necessary, initiates enforcement actions on behalf of its members and itself. Waterkeepers’ main
25 office is in San Francisco, California. Waterkeepers has approximately 2,500 members who
26 reside in the San Francisco Bay and Delta region. Furthermore, Waterkeepers operates two
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1 projects in Northern California under the fictitious business names “San Francisco Baykeeper”
2 and “Deltakeeper.”

3 10. Plaintiffs and their members regularly use and enjoy the fish, wildlife, water, and
4 other natural resources of the waters of the United States, including but not limited to the San
5 Francisco Bay and Delta, for a variety of recreational, aesthetic, educational, and scientific
6 purposes, including, but not limited to, boating, fishing, swimming, wildlife observation,
7 interpretative field trips, photography, nature study, and aesthetic appreciation. Plaintiffs and
8 their members intend to continue to do all of the foregoing on an ongoing basis in the future and
9 thereby do and will continue to derive recreational, aesthetic, scientific, educational,
10 conservational, and economic benefits from the natural resources of these aquatic ecosystems.
11 Defendant’s failure to properly regulate discharges from point sources into the waters of the
12 United States, including but not limited to the San Francisco Bay and Delta, pursuant to the
13 Clean Water Act has harmed and continues to harm Plaintiffs’ and their members’ recreational,
14 aesthetic, scientific, educational, conservational, and economic interests in the natural resources
15 of these waters.

16 11. Defendant Environmental Protection Agency (“EPA”) is the federal agency with
17 primary responsibility for implementing the Clean Water Act. EPA promulgated the permitting
18 exemption for discharges from vessels found at 40 C.F.R. § 122.3(a) and, on September 2, 2003,
19 denied Plaintiffs’ petition to repeal that exemption.

21 BACKGROUND

22 The Clean Water Act

23 12. The Clean Water Act prohibits the discharge of any pollutant from a point source
24 into navigable waters of the United States except when such a discharge is in compliance with a
25 permit, such as a NPDES permit. 33 U.S.C. §§ 1311(a), 1342, 1362.

26 13. The phrase “discharge of a pollutant” under the Clean Water Act includes “any
27 addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12).

1 14. The term “pollutants” under the Clean Water Act includes, among other things,
2 sewage, garbage, chemical wastes, and biological materials. 33 U.S.C. § 1362(6).

3 15. The term “navigable waters” under the Clean Water Act means the waters of the
4 United States, including the territorial seas. 33 U.S.C. § 1362(7). The term “territorial seas” is
5 defined under the Clean Water Act as the belt of the seas measured from the line of ordinary low
6 water along that portion of the coast which is in direct contact with the open sea and the line
7 marking the seaward limit of inland waters, and extending seaward a distance of three miles. 33
8 U.S.C. § 1362(8).

9 16. The term “point source” under the Clean Water Act is defined as “any discernible,
10 confined, and discrete conveyance, including but not limited to any . . . vessel or other floating
11 craft from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14). Accordingly, a
12 vessel or other floating craft constitutes a point source under the Clean Water Act.

13 17. The Clean Water Act exempts only two classes of vessel discharges from the
14 NPDES permit requirements, including “sewage from vessels” or a “discharge incidental to the
15 normal operation of a vessel of the Armed Forces.” 33 U.S.C. § 1362(6)(a). The Clean Water
16 Act does not contain an exemption from the NPDES permit system for any other class of vessels
17 discharging into the navigable waters of the United States.

18 **Discharges from Vessels**

19 18. Vessels and other floating craft (hereinafter “vessels”) routinely discharge
20 effluent into navigable waters of the United States. Such vessel discharges include, among other
21 things, ballast water, bilge water, cooling water, deck runoff, graywater, and oil or oily water.
22 These discharges may and often do contain non-native species, pathogens such as bacteria and
23 viruses, suspended solids, ammonia, detergent, solvents, organic matter, hydrocarbons, heavy
24 metals, hazardous chemicals, paint chips, and contaminated sediment.

25 19. For example, cargo and other commercial vessels frequently discharge water from
26 their ballast tanks into navigable waters of the United States. Such ballast water discharges
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1 typically contain a variety of biological materials, including plants, animals, viruses, and
2 bacteria. These materials often include non-native, nuisance, exotic, or invasive species
3 (hereinafter “invasive species”) which constitute pollutants under the Clean Water Act.

4 20. Invasive species can cause extensive ecological and economic damage to aquatic
5 ecosystems. Recent studies suggest that invasive species cost the United States more than \$5
6 billion per year. Furthermore, the environmental damage attributable to invasive species in the
7 San Francisco estuary alone includes reduction or local extinction of native species, disruption of
8 the aquatic food chain, erosion of shorelines, and additional ecosystem alterations that extend to
9 bird and wildlife populations.

10 **EPA’s Regulatory Exemption for Vessel Discharges**

11 21. Through a regulation promulgated in 1973, EPA categorically exempted from the
12 NPDES permitting requirements “any discharge of sewage from vessels, effluent from properly
13 functioning marine engines, laundry, shower, and galley sink wastes, or any other discharge
14 incidental to the normal operation of a vessel.” 40 C.F.R. § 122.3(a).

16 22. The term “discharge incidental to the normal operation of a vessel” is defined by
17 the Clean Water Act to include ballast water, as well as graywater, bilge water, cooling water,
18 weather deck runoff, and oil water separator effluent. 33 U.S.C. § 1322(a)(12)(A)(i).

19 23. Pursuant to 40 C.F.R. § 122.3(a) as promulgated, EPA has determined that
20 persons discharging pollutants found in ballast water discharge, as well as in a number of other
21 types of vessel discharges, into navigable waters of the United States are not required to obtain a
22 NPDES permit.

23 24. This categorical exemption of vessel discharges from the NPDES permit
24 requirements is inconsistent with the plain language of the Clean Water Act and in excess of
25 EPA’s statutory authority under that statute.

26 **Procedural Background**

27 25. On January 13, 1999, Plaintiffs petitioned EPA to repeal 40 C.F.R. § 122.3(a) on
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1 the grounds set forth in paragraph 24 above.

2 26. In response to Plaintiffs' petition, EPA released a draft report on ballast water and
 3 aquatic nuisance species in September 2001. This report summarizes many of the concerns
 4 about the impact of invasive species expressed in Plaintiffs' petition. However, EPA did not
 5 respond to Plaintiffs' petition at that time.

6 27. On September 2, 2003, EPA finally took final agency action on Plaintiffs'
 7 January 13, 1999 petition to repeal 40 C.F.R. § 122.3(a) by denying that petition and declining to
 8 repeal 40 C.F.R. § 122.3(a). Accordingly, EPA's action is now ripe for judicial review.

10 **CLAIMS FOR RELIEF**

11 **First Cause of Action**

12 28. Plaintiffs hereby reallege and incorporate by reference the allegations set forth in
 13 paragraphs 1 through 27 as if set forth in full.

14 29. The vessel discharge exemption set forth in 40 C.F.R. § 122.3(a) is inconsistent
 15 with, and in excess of EPA's statutory authority under, the Clean Water Act.

16 30. EPA's unlawful promulgation of 40 C.F.R. § 122.3(a) is subject to review under
 17 Section 706(2) of the Administrative Procedure Act, 5 U.S.C. § 706(2).

18 **Second Cause of Action**

19 31. Plaintiffs hereby reallege and incorporate by reference the allegations set forth in
 20 paragraphs 1 through 27 as if set forth in full.

21 32. EPA's denial of Plaintiffs' January 13, 1999 petition requesting repeal of 40
 22 C.F.R. § 122.3(a) was arbitrary, capricious, an abuse of discretion and not in accordance with the
 23 Clean Water Act.

24 33. EPA's denial of the petition to repeal 40 C.F.R. § 122.3(a) is subject to judicial
 25 review under Section 706(2) of the Administrative Procedure Act, 5 U.S.C. § 706(2).

26 **PRAYER FOR RELIEF**

27 WHEREFORE, Plaintiffs respectfully request that the Court:

(1) Adjudge and declare that the permit exemption for vessel discharges promulgated at 40 C.F.R. § 122.3(a) is unlawful because it is inconsistent with, and in excess of EPA's statutory authority under, the Clean Water Act;

(2) Adjudge and declare that all discharges of a pollutant from vessels or other floating craft into the navigable waters of the United States, other than sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces within the meaning of section 1322 of the Clean Water Act, are required to obtain NPDES permits;

(3) Adjudge and declare that EPA's denial of Plaintiffs' petition to repeal 40 C.F.R. § 122.3(a) was arbitrary, capricious, an abuse of discretion and not in accordance with law;

(4) Order EPA immediately to repeal 40 C.F.R. § 122.3(a);

(5) Award Plaintiffs their reasonable fees, costs, expenses, and disbursements, including attorneys' fees, associated with this litigation; and

(6) Grant Plaintiffs such additional and further relief as the Court may deem just, proper and necessary.

DATED: December 22, 2003

Respectfully submitted,

/s/ Deborah A. Sivas

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